

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 2232 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PANNABEN HARISHBHAI KAPASI

Versus

RATHI CONSTRUCTION & FINSTOCK CO.PVT.LTD.

Appearance:

MR KG SHETH for Petitioner
MR DHARMESH V SHAH for Respondent No. 1
MR KIRAN ACHARYA for Respondent No. 2
MR KS JHAVERI for Respondent No. 4, 5

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 23/07/97

ORAL JUDGEMENT

1. The petitioner-original plaintiff is aggrieved by the judgment and order of the 2nd Jt.Civil Judge(JD) dated 6.10.95 which was passed below Exh.25 in Reg.CS No.614/95. It is the case of the petitioner that Flat No.E-10 was allotted to him by Rathi Construction and

Finstock Co which is represented through its director and administrator--Dinesh Nemchand Jain. In that very scheme where Riddhi-Siddhi apartment was constructed at Jodhpur Char rasta, Flat Nos E-4, E-8 and E-9 were allegedly allotted to respondent No.2 and Flat E-10 was allotted to one Ushaben Mahendrabhai Soni who is third respondent herein. It is the case of the petitioner that out of total amount of Rs.1,21,000/- which was to be paid, Rs.91,000/- was paid by him and in support thereof he has produced two stamped receipts, dated 30.10.90 and 2.11.1990 and Flat No.E-10 was allotted to him. However, it was found that the first respondent namely Dineshbhai Nemchand Jain had also allotted Flat No.E-10 to respondent No.3 herein--Ushaben Mahendrabhai Soni who is also put in possession and therefore through his wife who is the Power of Attorneyholder instituted Civil Suit No.614/94 in the Court of Civil Judge(JD) at Ahmedabad against respondent-defendants for declaration that the respondent Nos 2 & 3 have no right, title or interest over Flat No.E-10 in Riddhi-Siddhi apartment and also prayed for temporary injunction by Exh.5 restraining the defendants, their servants and agents from transferring by way of gift, mortgage or any other method of transferring the block in question to anyone else.

2. Civil Judge(JD) appears to have granted injunction restraining the defendants from allotting Flat No.E-10 in Riddhi-Siddhi apartment. In the proceedings of the suit, the builder through its Director and Administrator--Dineshbhai Nemchand Jain remained present presumably because he has already pocketed the value of the very flat from another party. The petitioner was thus in predicament of having lost Rs.91,000/- and of not getting the possession of flat despite his readiness and willingness to pay the full amount as and when he was required to pay up the same. Petitioner thereupon gave an application at Exh.25 under Order 38 Rule 5 of C.P.Code to attach flat No.E-13 wherein the Director of the Construction namely Dineshbhai Nemchand Jain was residing so that in case of his success in the suit he can realise the money which he has already paid. Said application came to be dismissed by the Civil Judge (JD) Ahmedabad (Rural) on 6.10.95 against which the present CRA is filed by the original allottee who has already paid Rs.91,000/-. Having known the modus operandi of the builders who allot one and the same flat to number of parties and who recover value of such flat from number of parties this court at the admission stage took the matter very seriously and called upon Dineshbhai Nemchand Jain, the organiser and the builder to remain present before

this court. Matter was adjourned from time to time and respondent Nos 4 & 5 came to be impleaded as parties in the proceedings for whom Mr.K.S.Zaveri appeared. For Dinesh Nemchand Jain Mr.T.V.Shah has appeared and under the order passed by this court, said Dinesh Nemchand Jain has deposited Rs.15,000/- in this court on 26.9.96 and the Nazir branch has accepted said payment in the present proceedings and receipt is issued by Nazir branch. Respondent Nos 4 & 5 who are represented by Mr.Zaveri had deposited in this court amount of Rs.30,000/- on 14.10.96 and the Nazir branch has issued the receipt for the said payment. Thus, in all Rs.45,000/- is deposited in this court.

3. As against the claim of Rs.91,000/- which is made by the petitioner-plaintiff in this court, amount of Rs.45,000/- is secured which is deposited in this court and the Registrar of this court is directed to pay the said amount by A/c payee cheque in the name of Pannaben Harishbhai Kapasi, power of attorneyholder of Harishbhai Ambalal Kapasi. The question is now for the payment of the balance amount alleged to have been made by the petitioner-plaintiff to the respondent. In my opinion, this is purely a money claim which could be tried on merits after framing issues and leading evidence in the appropriate competent court. The petitioner is at liberty to proceed further with the suit already filed after appropriately amending the suit and in such suit the petitioner shall give adjustment of amount of Rs.45,000/-, i.e. adjustment of Rs.15,000/- to Dineshbhai Nemchand Jain and adjustment of Rs.30,000/- to Ravikant R.Rathi-respondent No.4 and Arunkant R.Rathi--the respondent No.5 herein. The petitioner can also apply afresh for any other appropriate relief in such suit by properly amending the plaint, including prayer for attachment before judgment under O.38 Rule 5 of C.P.Code.

4. In view of the aforesaid, no further effective relief could be granted to the petitioner excepting that it will be open for him to appropriately amend the plaint and to apply for appropriate prayer. Under any circumstances he shall have to give adjustment of the amount of Rs.45,000/- to Dinesh Nemchand Jain and respondent Nos 4 & 5 herein.

5. In the result, petition partially succeeds to the aforesaid extent only. Rule is made absolute to the aforesaid extent only. No costs.

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